IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 681 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PATEL LALLUBHAI ISHWARBHAI & 2 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR AD SHAH with MR YOGESH LAKHANI for Petitioner No(s).: 1-3.
MR AJ DESAI APP for Respondent No(s).: 1.

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CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE BANKIM.N.MEHTA

Date : 04/08/2005
ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

This appeal is directed against the judgment and order dated 27.4.1993 rendered by the learned Additional Sessions Judge, Mehsana in Sessions Case No.250 of 1992 convicting all three appellants herein for the offence punishable under Section 302 read with Section 34 IPC and imposing sentence of life imprisonment for causing death of Patel Tulsidas Laxmichand by inflicting stick blows on the head of the deceased and also by inflicting stick blows on the chest and hand of the deceased on 25.2.1992 at about 4 O'clock early in the morning, which resulted into death of Patel Tulsidas on 5.3.1992.

2. The prosecution case, briefly stated, was that there were elections for the office of Sarpanch and other members of the Gram Panchayat of village Balisana on 23.2.1992. The counting took place on 24.2.1992 and the result was declared late in the evening on 24.2.1992 at Patan. Patel Kantibhai Virchandbhai was declared elected as Sarpanch of the village. The victory procession was taken out in village Balisana at about 2 O'clock early in the morning of 25.2.1992. After the victory procession was over, deceased Tulsidas Laxmichand was returning home. At that time, the three accused (appellants herein) with sticks ran after Patel Tulsidas. Accused No.1 inflicted a stick blow on the head and accused No.2 inflicted stick blows on the waist and accused No.3 inflicted a stick blow on the back of the deceased. The deceased shouted for help and PW 7 Patel Dineshbhai Babaldas and PW 8 Patel Revabhai Ganeshbhai rushed to the spot, but the accused left. The deceased was immediately taken to the dispensary at Balisana where PW 3 Dr VA Patel examined him and took stitches on the wound on the head and after dressing the wound, the deceased was transferred to the Government hospital at Patan. PW 1Mr RK Patel, Executive Magistrate, recorded the dying declaration of the deceased at the Patan Hospital between 7.10 and 7.20 AM and thereafter PW 2 Dr Dasrathbharti Prasabharti Swami of Patan General Hospital gave treatment to the deceased and the first information report was lodged at 8.00 AM. Thereafter the deceased was shifted to the Civil Hospital at Ahmedabad for further treatment at about 11.15 AM and there the

deceased was examined by a Neurosurgeon and treatment was given. The deceased, however, succumbed to the injuries on 5.3.1992. The investigation was carried out and the accused were charge sheeted in the Court of learned JMFC, Patan. The case was ultimately committed to the Sessions Court at Mehsana.

3. When the charge was read out the accused pleaded not guilty and the prosecution led the following evidence:-

Dying declaration Exh.36 recorded by Executive Magistrate PW 1 Rameshbhai Keshavbhai Patel at Exh.33 along with Police yadi at Exh.35.

PW 7 Dineshbhai Babaldas Patel was examined at Exh.61 as the eye-witness.

PW 8 Revabhai Ganeshbhai Patel was examined at Exh.62 as a witness who reached the spot after the assault and before whom the deceased allegedly made an oral dying declaration implicating the present three accused with stick blows.

PW 9 Hiraben Tulsidas, widow of the deceased was examined at Exh.63 for the alleged oral dying declaration made by the deceased implicating the three accused inflicting the stick blows.

The prosecution also examined police witnesses and panch witnesses in connection with the panchnama for the scene of offence, inquest panchnama, panchnama for the blood stained clothes of the injured who subsequently succumbed to the injuries and also panchnama of discovery of the sticks by the accused.

In their further statement under Section 313, the accused pleaded the case of total

denial. As far as accused No.1 is concerned, he stated at the end of his further statement (Page 34) that he had lost at the elections for the office of Sarpanch and he had congratulated the elected candidate Kantibhai Virchandbhai and thereafter he had gone to the house of his son Jayantibhai Lallubhai at Patan at about 12.15 at night hours and had gone to sleep and that he had not gone from the house of his son to Balisana and hence he was not at all present at village Balisana at the time of the incident.

The accused also examined three witnesses -

(i) DW 2 Dr Mansingbhai L Chaudhari, Medical Officer at Government Hospital, Patan who had made the endorsement for transferring the deceased from Patan Hospital to Civil Hospital at Ahmedabad. This witness was examined at Exh.85 with case papers at Exh.87 to show that the deceased was not in a fit mental and physical condition to make the dying declaration Exh.36 at Patan Hospital.

(ii) DW 1 Police Constable Mahendra Dilusinh of Balisana Outpost was examined at Exh.84 to indicate that there was pelting of stones at Ram Mandir during the election procession (page 184).

(iii) DW 3 Mukesh Premjibhai Patel Exh.88 (Page 195) who was a candidate at the Panchayat elections.

During the cross-examination of the prosecution witnesses, the defence had made suggestions that the deceased was injured on account of pelting of stones during the victory procession as there was commotion and that police were also informed about the trouble which had taken place during the election procession.

4. After considering the oral and documentary evidence on record, the learned

Sessions Judge held that the prosecution had proved beyond reasonable doubt that all the three accused had assaulted the deceased with sticks and had inflicted the stick blows on the head and other parts of the body of the deceased with the intention of causing death of the deceased as accused No.1 had lost at the elections. The learned Sessions Judge did not accept the plea of alibi raised by accused No.1 and drew adverse inference against the accused for not examining Jayantibhai son of accused No.1 at whose residence at Patan accused No.1 had allegedly gone at 12.15 in the night i.e early morning of 25.2.1992. The learned Additional Sessions Judge accordingly convicted all the three accused for the offence punishable under Section 302 read with Section 34 IPC and sentenced them to suffer life imprisonment.

It is against the aforesaid judgment dated 27.4.1993 that the accused have come in appeal before this Court.

5. The accused were detained during pendency of trial for about six months and after conviction on 27.4.1993, the accused were again arrested and thereafter they were released on bail. Accused No.1 was released on bail on 24.11.1993 and accused Nos.2 and 3 were released on bail on17.8.1993.

We may note that appellant No.3 Patel Gordhanbhai Savjibhai expired during pendency of the appeal i.e on 23.10.1999 and that fact has been brought on record by the affidavit of Patel Harjibhai son of Patel Naranbhai residing at Balisana, copy of death certificate dated 28.10.1999 is also produced along with the said affidavit indicating that appellant No.3 Patel Gordhanbhai Savjibhai expired on 23.10.1999.

6. At the hearing of this appeal, Mr AD Shah, learned counsel for the appellants has raised the following contentions:-

(i) The learned trial Judge has erred in relying on the dying declaration at Exh.36, when the bare reading of the dying declaration itself would indicate that the deceased was not mentally fit to give a dying declaration; more particularly the answers to the last two questions indicate that the deceased was not fully conscious or mentally fully alert to understand and answer the questions.

It is also submitted that the dying declaration could otherwise also not have been relied upon because the deceased had referred to dharia being held and inflicted by accused No.1 when subsequently no mention of dharia is to be found in the FIR Exh.77 recorded barely 40 minutes after recording of the so-called dying declaration. The medical evidence also rules out any dharia blow having been inflicted on the deceased.

(ii) The learned trial Judge also ought to have discarded the FIR at Exh.77 which was allegedly recorded at 8 O'clock in the morning of 25.2.1992 barely 40 minutes after recording of the dying declaration. When the deceased was not in a position to even follow and answer the last two questions put by the Executive Magistrate at about 7.20 AM, it is not possible to believe that the deceased would give a detailed complaint 40 minutes thereafter giving out the date of voting being 23.2.1992, the date of counting of votes at Patan being 24.2.1992 and also giving the election symbol (elephant) of the elected candidate Kantibhai Virchandbhai. It is stated that the meticulous details given in the FIR in the above physical state of the complainant cannot be believed when the deceased had received injuries on his head and was immediately required to be shifted from Balisana to Patan and within about 4 hours from Patan to Civil Hospital, Ahmedabad. The learned counsel for the appellants has also

highlighted material contradictions and omissions between the particulars given in the FIR and the statements of the witnesses who were examined as either eye-witness or the witnesses who met the deceased immediately after the incident.

(iii) The learned counsel for the appellants has also submitted that the case papers only give the history of the assault or `maramari', but there is no reference to the weapon/s with which the injuries were inflicted on the deceased.

(iv) The so-called eye-witness PW 7 Dineshbhai Babaldas Patel Exh.61 is a chance witness whose presence at the scene of offence has not been explained. It is submitted that the case of the said witness that he had gone out at 4 O'clock in the early morning hours of 25.2.1992 is not believable when he had not participated in the election victory procession and he had allegedly gone out looking for his son, but after the incident he went home without looking for his son who had allegedly gone out in the victory procession or without taking the deceased to the hospital who had received injuries on his head and was bleeding. It is, therefore, submitted that the presence of the said witness at the scene of offence cannot be believed. It is also submitted that the said witness is a close relative of the deceased being nephew of the deceased as the grandfather of witness Dineshbhai and father of the deceased were real brothers.

(v) As regards the evidence of PW 8 Revabhai Ganeshbhai Patel and PW 9 Hiraben Tulsidas, it is submitted by the learned counsel for the appellants that neither of the witnesses was present at the time when the deceased had received the blows and according to the said witnesses also PW 8

Revabhai had reached the spot after assailants left the scene of offence and the so-called oral dying declaration given by the deceased before Revabhai cannot be believed. So also, the so-called oral dying declaration given by the deceased before his wife PW 9 Hiraben Tulsidas Exh.63 cannot be believed in view of the various material contradictions in her evidence and the evidence of Revabhai and Dineshbhai.

(vi) The defence had all along taken the stand during the examination of the concerned witnesses that during the victory procession which commenced at 2 O'clock commotion had taken place as there was a large crowd and police constable DW 1Mahendrasinh Dilusinh Exh.84 realizing the seriousness of the disturbance requested for more SRP and police at about 3.00 AM and that telephone entry No.13 was also made to that effect in the telephone register at Exh.66. During the cross-examination of the prosecution witnesses it was suggested to them that on account of the disturbances there was pelting of stones during the victory procession and, therefore, the deceased got injured on account of such pelting of stones.

(vii) Though there was a large crowd of about 3000 persons in the election procession no independent person has seen the alleged assault by the accused on the deceased.

(viii) On the question of motive also it was submitted that there was no personal enmity between the deceased and the accused and there was no reason for the accused to assault the deceased as he was not even the candidate contesting the election nor was he shown to be related to the elected Sarpanch.

(ix) Reliance is also placed on the decisions reported in Lallu Manjhi vs. State of Jharkhand, **AIR 2003 SC 854**, Ramsewak vs. State of MP, 2004 **Cri. LJ 3043,** Narain Singh vs. State of Haryana, **AIR 2004 SC 1616**, Lella Srinivasa Rao vs. State of Andhra Pradesh, **AIR 2004 SC 1720**, and Shankarlal vs. State of Rajasthan, **AIR 2004 SC 3559**.

7. On the other hand, Mr AJ Desai, learned Addl. Public Prosecutor has opposed the appeal and supported the judgment under appeal. The learned APP has vehemently submitted that even if there may be some minor infirmities or discrepancies or contradictions in the dying declaration Exh.36 and in the First Information Report Exh.77 or there may be some omissions in the depositions of prosecution witnesses, each piece of evidence is not required to be considered in isolation, but all the pieces of evidence are required to be taken together and appreciated and there was no reason for the prosecution to falsely implicate the accused. Neither the deceased who filed the complaint nor eye-witness Dineshbhai and other two witnesses before whom the deceased had made oral dying declaration are shown to have any enmity with the accused and, therefore, they had no reason to falsely implicate the accused. The learned APP has, therefore, submitted that the appeal deserves to be dismissed.

8. Before dealing with the rival submissions, it is necessary first to refer to the medical evidence. The post-mortem was conducted by PW 5 Dr VV Patel Exh.51 of Civil Hospital, Forensic Medicine Department at Ahmedabad who was examined and the PM report is to be found at Exh.52 (Page 121). The said PM note indicates the following external injuries in column No.17 :-

> "Surgically stitched wound present over head at left temporoparietal region about 4 cm away from sagittal plan size 4-5 cms long with four surgical stitches. Swelling present in the surrounding area. Stitches are removed to examine further.

The margins of the wound are indurated and approximated with newly formed tissue, reddish in colour, the wound is in coronal plane."

In column No.18, the injury mentioned is - A fracture is palpated underneath scalp on posterior part of parietal region.

No other external injuries were noticed.

Column No.19 of the PM report gives details of the internal injuries corresponding to the above external injuries.

Since the alleged dharia blow referred to in the dying declaration was not referred to even in the first information report, it was not the case of the prosecution that the above injury was caused by any dharia blow and the prosecution case from the stage of FIR has been that the accused No.1 had given a stick blow on the head of the deceased.

9. In light of the above medical evidence and the prosecution case itself that the deceased had received a stick blow on his head, the question is what probative value can be attached to the dying declaration Exh.36 which was given by the deceased between 7.10 and 7.20 AM on 25.2.1992 i.e after about three and a half hours after the time of the incident. In the dying declaration Exh.36, which commenced at 7.10 AM on 25.2.1992, the deceased gave the following replies to the questions put by the Executive Magistrate:-

Q. What is your name ?

A. My name is Patel Tulsidas Laxmichand, aged about 70 years, Occupation Agriculture, residing at Mariyavado in Balisana.

Q. At what time did you receive injuries ?

A. At about 4 O'clock this morning.

Q. How did you get hurt ?

A. When I was returning a dharia blow was given to me. The dharia was of Lallu Sarpanch (accused No.1) he hit me on the head. Patel Babu Savji (accused No.2), gave a stick blow. Patel Gordhan Savji (accused No.3) gave a blow.

Q. Where were you and where were you assaulted ?

A. I was returning from the procession. There was maramari (literally translated scuffle) near Mataji's temple at Balisana.

Q. What was the dispute about ?

A. I was given a blow on the head. I was returning from the procession and blows were given.

Q. Do you want to say anything else ?

A. I was returning and I was given blows on head. Apart from that I do not want to say anything.

Left thumb impression of Patel Tulshibhai Laxmichand

Dt.25.2.92

Time 7.20 sd/- illegible (Executive Magistrate)

The patient is conscious and can give reply.

Sd/- illegible

Dr. DP Swami

7.10 to 7.20

(emphasis supplied)

10. At 8 O'clock, PW 12 Police Constable Udaji Sakuji of Patan Police Station recorded the FIR of deceased Tulsibhai Laxmichand Patel, aged 70 years. In the said FIRat Exh.77, the deceased who was then only an injured person, gave his name, age, occupation, address and gave the details about the election to the office of Sarpanch of village Balisana where the rival candidates were Patel Kantibhai Virchandbhai and accused No.1 Patel Lallubhai Ishwarbhai. The voting for the office of Sarpanch took place on 23.2.1992 and the counting took place at Patan on 24.2.1992. Patel Kantibhai Virchandbhai with the election symbol of elephant belonging to their party (party of the deceased) got elected. Hence on the night between 24th and 25th February 1992 all the persons belonging to the party of Patel Kantibhai Virchandbhai including the deceased took out a victory procession at about 2 O'clock in the morning and thereafter at about 4 O'clock in the morning when the deceased was returning and was near the temple of Mataji, accused No.1 met the deceased. Accused No.1 was carrying a stick with him. He gave a stick blow on the head of the deceased. All the three accused gave abuses to the deceased and stated that Kantibhai has become Sarpanch and look how Kantibhai is going to enjoy his office. After stating so, accused No.3 gave a stick blow on the chest of the deceased and accused No.2 gave a stick blow on the back of the deceased and also a blow on the right hand finger of the deceased. The deceased shouted and PW 7 Patel Dineshbhai Babaldas and PW 8 Patel Revabhai Velabhai rushed and rescued the deceased from further beating. All the three accused gave threats to the deceased that they will kill him. Thereafter the deceased was taken to the Government dispensary at Balisana and given treatment. On account of the serious injuries, the deceased was shifted to the Government hospital at Patan. The deceased was fully conscious.

This is how the first information report was alleged to have been given before the police constable at 8.00 AM on 25.2.1992.

11. It is thus obvious that while the version of the deceased in the dying declaration at about 7.10 AM was that accused No.1 had come with a dharia and inflicted a dharia blow

on the head of the deceased, in the FIR allegedly lodged by the deceased at 8.00 AM on the same morning, which is barely after 40 minutes, the deceased stated that accused No.1 had given a stick blow on the deceased. The FIR did not contain any reference to dharia. A positive statement is made in the FIR that accused No.1 was carrying a stick in his hand and he gave a blow with that stick on the head of the deceased. Apart from the above material contradiction between the two versions allegedly given by the deceased within a span of less than an hour, the answers given by the deceased to the last two questions put by the Executive Magistrate are very significant. After inquiring about the time and place of injury, time and place of the incident and as to how the incident took place, when the Executive Magistrate put a specific question about the cause of the incident and also asked whether the deceased wanted to add anything, the deceased appears to have given the same incoherent answer to the effect that he was hit on the head and that he was returning from the procession and that a blow was given to him on his head. When the said answers are read in conjunction with the previous questions – answers and the specific questions posed to the deceased, it becomes obvious that the deceased was not fully mentally alert when his dying declaration was recorded. On the one hand, the dying declaration suffers from these serious infirmities and on the other hand, the FIR recorded just 40 minutes after the dying declaration was recorded contained meticulous details about not only the date of voting and the date of counting for the elections to the office of Sarpanch of Balisana Gram Panchayat, the FIR even gave the particulars about the election symbol of the elected Sarpanch Kantibhai Patel. Such meticulous details in the FIR shake the credibility of the FIR. The very fact that the physical condition of the deceased was serious and after his admission to the Balisana dispensary at 5.00 AM, the deceased was required to be shifted to Patan hospital at about 6.10 AM and even from Patan, the deceased was required to be shifted to Ahmedabad Civil Hospital at about 11.15 AM same morning lend credence to the defence case that the deceased was not in a mentally fit condition to give either the dying declaration much less the detailed first information on the basis of which order of conviction can be passed

in a serious offence punishable under Section 302 IPC.

12. It is true that PW 2 Dr DP Swami had certified on the dying declaration itself that the patient was conscious between 7.10 and 7.20 AM during which time the dying declaration at Exh.36 was recorded, but even on this aspect the evidence of Executive Magistrate PW 1Patel Rameshbhai Keshavbhai Exh.33 (Page 86) is very significant. In his examination-in-chief, the Executive Magistrate stated that the patient was in the emergency ward and Dr Swami had verified that the patient was conscious and that the witness had sent out all the parties outside the emergency ward. Apropos to that statement, the witness was specifically asked in the cross-examination whether Dr Swami was present in the room where the dying declaration was recorded by the witness, the witness stated in terms that at the time of recording of the dying declaration only the deceased and the witness (Executive Magistrate) were present and that no third person was present and the witness further stated that Dr Swami was not present in that room when dying declaration was recorded.

As against the above clear stand of the Executive Magistrate, PW 2 Dr DP Swami Exh.38 (Page 94-99) denied the suggestion made in his cross-examination that when the DD was to be recorded, the Executive Magistrate had asked him (Dr Swami) to go out of the room that the DD was recorded in his absence. Apart from denying that suggestion, the witness specifically stated in his cross-examination (para 8) that the Executive Magistrate had recorded the dying declaration of the deceased at Exh.36 in his presence, that is in presence of Dr DP Swami and that was within the hearing of Dr Swami and that he had no gone out of the room.

In view of the above material contradiction between the evidence of the Executive Magistrate and the evidence of the doctor who certified that the patient was conscious during the time when the dying declaration was recorded, read in light of the answers

given by the deceased to the last two questions out of only seven question put to the witness considerably shake the probative value of the dying declaration. In this set of circumstances, the decisions cited by the learned APP that conviction can be based merely on the sole basis of the dying declaration are of no avail to the prosecution because in those decisions, the Apex Court has held that the prosecution must prove that the deceased was in a fit mental condition to give voluntary dying declaration without being tutored by any person.

13. As already indicated earlier when the prosecution case that the deceased was in a fit mental condition to give dying declaration between 7.10 and 7.20 AM cannot be accepted, it is all the more difficult to accept that the FIR Exh.77 was the version given by the deceased himself at 8.00 AM, particularly when the FIR is full of meticulous details which could not be expected from a person having suffered serious head injury which did not allow him to give coherent answers to the questions put to the deceased just only 40 minutes back.

14. Coming to the evidence of PW 7 Dineshbhai Babaldas Patel at Exh.61 who is examined as a solitary eye-witness, the same has been challenged on various grounds, first being that the witness was a chance witness and secondly that he was a close relative of the deceased and thirdly on the ground that his conduct after the alleged incident was not natural conduct.

The first ground urged by Mr Shah for challenging the credibility of the witness that he was a chance witness merits acceptance because the alleged incident took place at 4 O'clock in the morning when a person would normally not be expected to be out of his house. Of course, the explanation given by the witness is that his son had gone out in the victory procession for celebrating the election of Kantibhai Patel as Sarpanch of village Balisana and since he had not returned, the witness had gone out of his house to look for

his son. Apart from the fact that no details are given about the geographical location of the place of incident, the house of the witness and the route of the election procession, the subsequent conduct of the witness in not going out to look for his son and also in not taking the deceased to the dispensary at Balisana, are all factors which weaken the prosecution case that Dineshbhai had witnessed the incident. The fact that Dineshbhai was nephew of the deceased (grandfather of Dineshbhai and father of the deceased were real brothers) is an admitted fact and, therefore, the possibility of Dineshbhai having been examined as a witness to the incident without his actually having been present at the place of the offence cannot be ruled out. This is not to say that the presence of Dineshbhai at the scene of offence cannot be believed under any circumstances; it is only in light of the material on record that we are giving the benefit of doubt to the accused that there is a possibility that Dineshbhai is a chance witness and that when we have found serious infirmities in the dying declaration at Exh.36 as well as the FIR at Exh.77, those weak pieces of evidence cannot be taken to have been corroborated by the testimony of PW 7 Dineshbhai Patel who was a close relative of the deceased.

15. As regards the evidence of PW 8 Revabhai Ganeshbhai Patel at Exh.62 he does not claim to have witnessed the incident, but according to him when he heard the shouts at about 4 O'clock in the morning he saw a person having fallen down and three persons with sticks going away. When he went near the spot he found that his neighbour Tulsidas was lying on the ground and Dineshbhai and the witness supported the deceased for getting up from the ground. At that time, the witness asked the deceased as to what had happened and the deceased answered that the three accused herein had given stick blows to the deceased when he was returning from the procession of Kantibhai. The witness and Dineshbhai thereafter took the deceased to his residence (residence of the deceased) and laid him down on his cot at the residence and thereafter the witness went home. The witness admitted in his cross-examination that he had not stated before the police in the statement recorded at 11.00 AM on 25.2.1992 that Dineshbhai was also present at the

scene of offence or that he had seen three persons going away from the scene of offence. The witness further stated in his cross-examination that after taking the deceased to his residence (residence of the deceased) the witness did not speak to the wife of the deceased about the incident nor did he meet the son of the deceased.

The statement made by PW 9 Hiraben in her cross-examination (para 6) that after Dineshbhai and Revabhai brought her husband to their residence (residence of the deceased) neither Dineshbhai nor Revabhai informed the witness about the incident nor did the witness ask them about the incident, cannot be stated to be natural conduct of such a close relative of the deceased that she would not ask as to how the deceased sustained such serious injuries resulting into bleeding. In view of the above contradictions, omissions and unnatural conduct on the part of the witnesses, such evidence cannot be relied upon to hold that the prosecution has proved the charge against the accused beyond reasonable doubt.

16. It is true that the learned APP has submitted that no enmity is shown for which the witnesses would falsely involve the accused. As already indicated earlier, out of the three witnesses only one witness is held out to be an eye-witness and the other two witnesses had admittedly not seen the incident. Dineshbhai, supposed to be the solitary eye-witness, is a close relative of the deceased and is found to be a chance witness. The infirmities in the dying declaration and the meticulous details in the FIR, the material contradictions between the dying declaration and the FIR given by the same person (the deceased) within a span of less than an hour and all the aforesaid aspects including omissions in the evidence of the witnesses do not enable the prosecution to show beyond reasonable doubt that it was the accused who had committed the crime. Hence, even though the evidence of the witnesses may create suspicion against the accused, such a suspicion is not sufficient to prove the charge against the accused.

17. As regards the muddamal sticks allegedly produced by the accused as per the panchnama at Exh.57 (Page 137), no blood stain marks were found on the sticks, even though the panch witness had made a minute scrutiny of the sticks. The FSL report at Exh.29 (Page 82-83) also indicates that no blood stained marks or blood traces were found on the sticks at muddamal articles 3, 4 and 5. If the blows were given on the head and body of the deceased with the sticks which were allegedly produced as per panchnama Exh.57, the sticks would have also borne the blood stained marks which are found on the clothes of the deceased at muddamal articles 1 and 2. Moreover, the prosecution case that various blows were given on the body of the deceased including head, chest and back but the PM note at Exh.52 does not bear out this version as the injuries were found only on the head of the deceased.

In view of the above, it cannot be said that the prosecution has proved the charge against the accused beyond reasonable doubt.

18. In view of the above discussion we are of the view that the conviction of the accused for the offence of causing death of Patel Tulsidas Laxmichand deserves to be set aside.

19. As far as appellant No.3- original accused No.3 Patel Gordhanbhai Savjibhai is concerned, his appeal abated upon his death on 23.10.1999.

As far as appellant Nos.1 and 2, Patel Lallubhai Ishwarbhai and Patel Babubhai Savjibhai are concerned, their appeal is allowed. Their conviction for the offence punishable under Section 302 read with Section 34 IPC is set aside. Since the said appellants were on bail during pendency of the appeal, their bail bonds shall stand discharged.

(M.S. SHAH, J.) (BANKIM N. MEHTA, J.)

zgs/-